IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 514.

S. W. VANCE, W. N. BAHR, J. M. SCOTT, ET AL.,
APPELLANTS,

vs.

W. A. VANDERCOOK CO., APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

REPLY BRIEF FOR APPELLEE.

There are a number of positions taken in appellants' brief that it is proper to notice briefly.

I.

The position of the attorney general of South Carolina (pp. 13–15, Appellants' Brief) is that section 15 of the act of 1895, which directs that the State commissioner shall purchase his supplies from the brewers and distillers of this

State when their products reach the standard required by this act, provided they can be purchased as cheaply from the brewers and distillers in this State as elsewhere, contained in section 15 of the act of 1895 (printed in *Donald vs. Scott*, 165 U. S., 75, 92), and the further section 23 of the act of 1895, that the State commissioner may "enter into contracts with responsible grape-growers in this State, and sell domestic wines through the dispensary, so as to encourage grape-growing in this State, and in furtherance of this object not more than 10 per cent. profit to the dispensary, over the expenses of bottling, labeling, freighting, etc., shall be charged in the handling of such wines" (*Donald vs. Scott*, 165 U. S., 79, 80, 92, 93), has been repealed by the act of 1896 (pp. 1, 27, Appendix).

We submit, however, that there has been no such repeal. It is true that these provisions of the act of 1895 do not appear in the act of 1896, but they are, nevertheless, a part of the statute law of the State, for the act of 1896, by its title, is an act to "*further* regulate the sale, use, &c., of intoxicating liquors" (Appendix, p. 1), and the repealing clause of this act of 1896, to wit, section 47, only repeals "all acts or parts of acts inconsistent with this act" (p. 27, Appendix). Now, by reference to the act of 1896, section 3, "the State commissioner is to furnish all intoxicating liquors for lawful use in this State to such persons as may be designated as dispensers thereof, to be sold as hereafter prescribed in this act" (p. 3, Appendix), and in the act of 1897, section 3, "State commissioner shall furnish all intoxicating liquors for lawful sale in this State to such persons as may be designated as dispensers thereof, to be sold as hereafter prescribed in the act." (Appendix, p. 33, section 3.)

It thus appears that the person who, under the act of 1895 and 1897, was to furnish all intoxicating liquors for lawful sale in this State is a State commissioner.

The act of 1896 and 1897 is wholly silent as to where

and from whom shall be bought the intoxicating liquors to be sold by the State officers.

The act of 1895, we have seen, declares that it shall be bought "from the brewers and distilleries of this State if of the same standard, and as cheaply," and also provides for a special contract with grape-growers of the State to encourage grape-growing in the State. Neither of these provisions of the act of 1895 are *inconsistent* with the act of 1896 and 1897 and cannot be held a repeal by the act of 1896 and 1897, which by the title is only a *further* regulation and which only repeals acts and parts of acts inconsistent therewith.

The law of the State of South Carolina as to repeal is set forth very fully in the case of the *State vs. Branham*, 13 S. C., 394, where the court say:

"To have that effect (repeal), the new law must cover the whole subject exhaustively and be absolutely inconsistent with the old law. Acts upon the same subject which can stand together are construed *in pari materia*. If they are consistent, they both stand. If part is consistent and part not, the repeal only operates upon the inconsistent part." (State *vs.* Branham, 13 S. C., 394, and cases cited.)

The principle is affirmed in *State vs. Corley*, 13 S. C., 3:

"There must be such a positive repugnancy between the new law and the old that they cannot be reconciled."

The repealing words here, section 47 of the act of 1896, are limited to such acts and parts of other acts as are *inconsistent* with this act, and these provisions of the act of 1895 are still of force, as being in no way inconsistent. To the same effect are the decisions of the Supreme Court of the United States.

Chew Heong *vs.* United States, 112 U. S., 536, 549, 550, and cases cited.

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Even if the act of 1896 and 1897 did repeal these special provisions of this act of 1895, such repeal only enlarged the capacity for discrimination by State commissioner. It only gave thereby unlimited power and authority to the State officer to make contracts with the South Carolina grape-growers for the encouragement of grape-growing in South Carolina on even more advantageous terms than 10 per cent., and even more to the disadvantage of the grape-growers of other States, and also gave an unlimited power for discrimination in the State officer in furnishing liquor for lawful sale. It has given him, indeed, in his absolute authority, the power to buy from State breweries and State distilleries, even when their products of equal standard are not as cheap as products of other States, to the exclusion of all competition of products of other States for sale within the State.

How this unlimited power is exercised is manifested by the uncontradicted testimony of R. R. Turner, representing the Vandercook Company (folio 90, Record), which is that for seven years, since the dispensary reign in South Carolina, neither under the act of 1895 nor 1896 nor 1897 have California wines from these five valleys ever been upon sale in the State dispensaries of South Carolina—that is, upon the facts before this court, here is a State policy of continuous perpetual exclusion by the State, and also a denial altogether of the opportunity of inspection and sale under equal regulations in the markets of the State, alongside of the products of the State, and such other products of other States as the State of South Carolina chooses to import for sale in her liquor shops throughout the State, and which she has been and is now *actually* selling by wholesale and by retail to all her citizens throughout the State.

II.

In reply to claim of the Attorney General that *Donald vs. Scott*, 165 U. S., 100, was decided upon two express discriminations in act of 1895, to wit, making a special rate of profit for local wines without fixing any rate of profit for foreign wines, and requiring State commissioner to buy beer and liquor of local brewers and distillers, when local product was as cheap and equaled others in quality, we answer:

The *fact* is, the *express* reason given by Supreme Court for its decision is not at all upon these points, which are minor, but upon the broad ground that under the dispensary law "liquor is lawfully made, bartered, and sold in South Carolina, and THEREFORE an article of *interstate commerce*, and not within the scope and operation of Wilson act, and for that reason must have protection of Federal court in that commerce like *any other article*."

This is the principle of the decision carefully formulated in the rubric, 165 U. S., 58, and also especially stated in the following passages, the broad principle and the reason therefor being asserted together *repeatedly*:

"*So long*, however, as State legislation continues to recognize wines, beer, and spirituous liquors as articles of lawful consumption and commerce, *so long* must continue *the duty* of the Federal courts to afford to such use and commerce the *same measure* of protection, under the Constitution and laws of the United States, as is given to *other articles*." (*Donald vs. Scott*, 165 U. S., 91.)

"In view of these and similar provisions, it is indisputable that, whatever else may be said of this act, it was not intended to prohibit the manufacture, sale, and use of intoxicating liquors. On the contrary, liquors and wines are recognized as commodities which may be lawfully made, bought, and sold, and *must*, THEREFORE, be deemed to be the subject of foreign and interstate commerce."

Idem, 93.

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"It is not a law purporting to forbid the importation, manufacture, and sale and use of intoxicating liquors as articles detrimental to the welfare of the State and to the health of the inhabitants, and HENCE it is not within the scope and operation of the act of Congress of August, 1890. That law was not intended to confer upon any State the power to discriminate injuriously against the products of other States in articles whose manufacture and use are not forbidden, and which are therefore the subjects of legitimate commerce."

Idem, 100.

"It is sufficient for the present cases to hold, as we do, that when a State recognizes the manufacture, sale, and use of intoxicating liquors as lawful, it *cannot discriminate* against the bringing of such articles in and *importing them from other States;* that such a legislation is void as a hindrance to *interstate* commerce and an unjust preference of the products of the enacting State as against similar products of the other States."

Idem, 101.

The present law, acts of 1896 and 1897, equally with the law of 1895, "does not purport to forbid the manufacture, sale, and use of liquor," and falls equally within the *same principle* declared by the court for the *same reason* also specially declared by the court.

III.

In answer to the statement of the Attorney General that under the dispensary law a citizen of South Carolina can get local and foreign wine both from the State dispensary and also import foreign wine for *personal use* from other States, and therefore discrimination is actually against local liquor! This is a mistake, because the fact is a citizen can get the local liquor in State dispensary, and if he could not import for his use foreign wine not sold in dispensary

it would discriminate against such foreign liquor. It is only partially putting the non-dispensary foreign wine on an equality to allow citizens to import for personal use. The full equality does not exist for California wine not sold in the State dispensary until the citizens of South Carolina can on the soil buy the non-dispensary imported wine (Vandercook & Co.'s California wines), as he can now buy within the State all dispensary local but only some imported wine—*i. e.*, only what the State board choose to import—and this denial of equality, in denial of equal provision and opportunity for inspection and *sale* within the State under equal regulations, is the very gist of the complaint of Vandercook & Co. in exclusion of their California wine products altogether from inspection and sale in the State.

IV.

In reply to the position of Attorney General that the dispensary system applies alike to citizens of all the States, including the people of South Carolina, the State enacting it, we say that the United States Supreme Court has said, "A *burden imposed on* INTERSTATE COMMERCE is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting it."

Barber vs. Minnesota, 136 U. S., 313–326.

This reply was made by Supreme Court to the contention in that case that the inspection on the hoof (by analogy, our exclusive dispensary system), "as a condition of *selling* in the State, is applicable alike to all owners of such animals, whether citizens of Minnesota or citizens of other States."

Idem, 326.

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But the Supreme Court brushed it aside by asking what was the "natural operation" of the law—did it exclude any meats from other States, equally sound, that were offered for *sale* in Minnesota? And finding it did so exclude, and thus discriminate, they pronounced the whole system a burden on interstate commerce and null and void. This is our identical position, for under Donald *vs.* Scott, 100 U. S., pp. 91, 93, wine, being manufactured, bartered, and sold as a beverage, is in South Carolina now under dispensary law as legitimate an article of *interstate commerce* as beef, and cannot be discriminated against.

LAW BEARING EQUALLY ON CITIZENS.

The Attorney General on this point quotes from the opinion of the court below at page 18 of his brief, and makes this remark upon it:

"If we were dealing with some commodity other than intoxicating liquors, the case of *Minnesota vs. Barber* might have some reasonable application. It is true the court in that case said, 'A burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute.' In applying this to the case at bar, the circuit court evidently overlooked the Wilson act, the very purpose of which was to subject interstate and domestic commerce in liquors to the same restrictions."

To this we answer that the circuit court has applied this passage to answer the Attorney General's argument in the same way that the Supreme Court in *Donald vs. Scott*, 165 U. S., 98, applied this passage and the whole case of *Minnesota vs. Barber*, in its exact language, to answer the same argument made by the Attorney General then, and now repeated here, on the Wilson act. When the Attorney General contended before this court, in *Donald vs. Scott*, that

as a consumer in South Carolina could not, under the act of 1895, buy from the South Carolina producer or from the non-resident producer, but only from the State officer, *therefore* the State law did not discriminate, but equally affected the foreign product and the local product, and was therefore within the Wilson act, this court said no, quoting the identical passage used by the circuit court below and showed the discrimination operating against the products of other States, and the whole passage quoted by the court from *Minnesota vs. Barber* in this connection is at pages 96, 97, 98, *Donald vs. Scott*, 165 U. S., and is in these words, which it is proper to repeat here in this connection:

"In Minnesota *vs.* Barber, 136 U. S., 313, 326, 328, the *facts* so closely resemble those shown by the record now under consideration and the *principles stated in the opinion are so applicable* that we shall state them with some particularity." * * * When Minnesota urged that * * * "a condition of the privilege of *selling* or offering for sale, in the State, the meats taken from them, is applicable alike to all owners of such animals, whether *citizens of Minnesota or citizens of other States.* To this we answer that a statute may, upon its face, apply equally to the people of all the States, and yet be a regulation of interstate commerce which a State may not establish. A burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute."

Scott vs. Donald, 165 U. S., 96, 97, 98.

This is the language of this court used in direct reference, it will be seen, to the dispensary law of South Carolina and the Wilson act, and did not overlook the Wilson act which it was discussing, and applied the principle to its discussion as being a principle which must be borne in mind always.

The system in Minnesota of local regulation requiring inspection on the hoof within one hundred miles of the place of slaughter operated to exclude all other sound meats of

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other States, although it bore equally on the resident and non-resident. So in this case the local regulation that, under the act of 1895, all lawful liquor must be bought from the State officer, and under the act of 1896, 1897, that all liquor must be furnished for *sale* by a *State officer*, operates to exclude from sale and consumption within the State all other equally pure and wholesome wines. The local State regulation operating in the one case is identical with the local State regulation operating in the other case. They both exclude the products of other States by necessary operation and deprive the citizen of his right of selection according to *his taste* and judgment of lawful commodities (Donald *vs.* Scott, 100 U. S., 99). As the court said in *Brimmer vs. Rebman*, 138 U. S., 78, "the statute, though avowedly enacted to protect its people against the sale of unwholesome meats, has no real or substantial relation to such an object, but by its necessary operation is a regulation of commerce beyond the power of the State to establish."

V.

The very same argument that the Attorney General used in United States Supreme Court in the case of *Donald vs. Scott* to defend a denial of importation for use is now used to defend the denial of importation for sale.

It was (as now) said that the State law making all liquor not *sold* by or bought from a State officer contraband was in exercise of the police power, because under police power the State could forbid *use* of all liquor, and therefore could restrain or regulate in any way the *use* of liquor by its citizens, as it is now said the State can forbid *sale* of all wine; therefore can forbid sale of wine except by State functionaries; that the dispensary law by and through State functionaries furnished both domestic and some foreign liquor, and there was no discrimination against foreign liquors,

and consumer could not complain of any discrimination, because dispensary has operated equally on all products of all States and all citizens of this State and other States.

The Supreme Court held, however, that the dispensary law was an unlawful exercise of police power in discrimination against the products of other States, and an obstruction of interstate commerce, and said:

"The prohibition of the importation of the wines and liquors of other States by citizens of South Carolina for their own use is made absolute and does not depend on the purity or impurity of the articles. *Only State functionaries are permitted to import into the State*, and thus those citizens who wish to use foreign wines and liquors are deprived of the exercise of their own *judgment and taste* in selection of commodities."

Donald vs. Scott, 165 U. S., 99.

The State functionaries, *i. e.*, the monopoly of the State, according to their "taste and judgment," to import and *sell* all wine for sole use of citizens, was thus denied absolutely by the Supreme Court.

In the same way the monopoly of the State functionaries for import and *sale* and their power to prevent the inspection and sale of Vandercook's imported California wines under equal regulations to those same citizens, "entitled to the exercise of their own judgment and taste in selection of commodities" within the State (as well as without the State), is equally a discrimination against products of California; and these "State functionaries," claiming this exclusive power to import and sell all the wine for lawful sale, according "to their taste and judgment," are as much without the police power in one case as in the other.

Is it not discrimination against Vandercook's California products to force citizens of South Carolina, entitled to the "exercise of their own judgment and taste in selection of commodities," to go three thousand miles to California to make a contract of bargain and sale there before they can

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buy Vandercook wines, when within the State those "State functionaries" are offering to these same citizens domestic and other wines for sale *on the spot*, in South Carolina?

The very marrow of the question is this right of exercise of "taste and judgment" of the consumer in South Carolina. If the Supreme Court had allowed it to depend on "taste and judgment" of State functionaries, where the State dispensary law put it, Vandercook & Co. could not complain; but, depending on the "taste and judgment" of the citizen consumer of South Carolina, Vandercook & Co. have a right to equal opportunity of inspection and sale in the market of South Carolina to furnish that "taste and judgment" of the South Carolina consumer and not be discriminated against by the standard (pronounced unlawful by the Supreme Court) of the "taste and judgment" of State functionaries. This is not equal privilege, equal opportunity in interstate trade in a lawful article. This is the wide difference between "some imported liquor" and "*all* imported liquor." (*Donald vs. Scott*, 165 U. S., 100.)

The United States Supreme Court say we are entitled to inspection and sale for "*all* imported liquor." It means *all* that comes by importation, all that offers, all that chooses to come for inspection and sale, under equal regulations, to answer the "taste and judgment" of the citizen, which he has the right to exercise in the State.

The exclusive State system, however, is "*some* imported liquor," according to the "taste and judgment" of State functionaries, such only as they choose shall come!—an unlawful system, operating in *discrimination*.

VI.

The Attorney General of the State (p. 26, Appellants' Brief) claims that "it has never held that the right to import and sell, in consequence of importation, implies the right to store and offer for sale at a regular place of business" (p. 27, Appellants' Brief).

This is grave error. As we have shown in our brief, the right of importation as a right of interstate commerce implies the right of sale as an inseparable incident, if interstate commerce exist at all. Such was the express decision in *Lyng vs. Michigan* (135 U. S., 161, 162). In that case, under the agreed statement of facts, "Hagemeister & Son, citizens and brewers of Wisconsin, owned a *warehouse* in the State of Michigan, where they *stored* quantities of lager beer, so made by them at Green Bay, Wisconsin, and from there shipped to their said *warehouse* in said village of Iron River, Michigan, to be there *stored* and disposed of."

"4. The defendant, Henry Lyng, employed by Hagemeister & Son, as their agents, to look after their said *warehouse* and to take orders for and deliver said beer so manufactured and stored, and collect and remit the proceeds of sale thereof to Hagemeister & Son."

"5. The said Henry Lyng, in the course of his employment for Hagemeister & Son, did deliver from said warehouse to Martin Lilly said lager beer in the original packages in which it had been shipped." (Lyng *vs.* Michigan, 135 U. S., 162.)

On this state of facts this court held "that the right of importation of ardent spirits, distilled liquors, ale, and beer from one city to another includes by necessary implication the right of sale in original packages at the place where the importation terminates." (*Idem*, p. 166.)

And that "Lyng was merely a representative of the importers, and his conviction cannot be sustained in view of the conclusion at which we have arrived." (*Idem*, p. 167.)

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The same state of facts existed in the case of *Leisy vs. Hardin*, "where the original packages were offered for sale by John Leisy, a resident of Keokuk, Iowa, and agent of Gus Leisy & Co., of Peoria, Illinois, in kegs or cases which were not broken or opened on the premises; that as soon as the same was purchased it was removed from the premises occupied by Gus Leisy & Co., which said *premises were owned* by Christian Leisy, a member of the firm of Gus Leisy & Co., residing in and being a citizen of Peoria, Illinois." (*Leisy vs. Hardin*, 135 U. S., 101.)

On this state of facts the court held—

"Plaintiffs in error are citizens of Illinois and imported in Iowa beer, which they sell in original packages *as described.*"

"They had a right to import this beer into the State, and they had a right to sell it." (*Leisy vs. Hardin*, 135 U. S., 124.)

It thus appears that the appellants' contention that it has never been held that the right to import and sell in consequence of importation implies the right to *store* and offer for sale at the regular place of business is wholly mistaken as a statement of the law of interstate commerce, and expressly decided to the contrary by this court. The case of *Pittsburg Coal Co. vs. Bates*, 156 U. S., 588, and *Brown vs. Houston*, 114 U. S., 632, have to do solely with taxation of property brought into the State, and would apply to the case of *Lyng vs. Michigan* and *Leisy vs. Hardin* and make taxable goods so sold, but it would not prevent their sale alongside of and in competition with other like products of the State, or of any other State, which were actually being sold at the time and place.

Indeed, in *Brown vs. Houston* it was expressly said of this coal, "It was subjected to no discrimination in favor of the goods which were the products of Louisiana;" and that is the gist of the question here. All that the complainant has asked in this case is to store and warehouse in the State of

South Carolina and sell in the State of South Carolina, in original, unbroken packages, as imported, his California wines. (Page 8 of Bill, fol. 6, Record; Injunction, fols. 61, 81, 82.)

This warehousing, storing, and selling their California wines in original, unbroken packages is, we submit, only interstate commerce, heretofore particularly described and affirmed as lawful interstate commerce in terms by this court.

VII.

The Attorney General (p. 24, Appellant's Brief) announces and argues this proposition: "Sales of intoxicating liquor in quantities of *one-half pint* or a pint are not sales in original packages within the meaning of the laws of commerce."

We submit that this question is not an issue in this case under the pleadings of the bill and the answer, is not decided by the court below, and is not contained in any assignment of error by the defendant in the record. (See assignment of error, fol. 94–95, Record.)

The question of what is an original package within the meaning of the interstate-commerce law is not before this court on this record. For that reason we have not discussed it in our brief for appellee.

The Attorney General admits that when liquors are put up and packed in a *case*, and thus shipped to a State in such *case*, the case is the original package (p. 34, Appellants' Brief).

Now, if we turn to the schedule of the California wines, etc., which are the subject-matter of this suit, we will find that all of these packages are shipped by the car-load lot or half-car-load lot, and were all shipped in *cases* or kegs with their stamps and brands (fol. 12 to 16, Record); that the seventy-three packages were of the value of twelve hundred dollars (fol. 3, Record) and constituted a car-load, of the average value of over seventeen dollars a package.

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The record therefore shows only these *cases* and kegs of wine, all large packages of wine, as original imported packages in this case, and no question in the court below, either in the bill or answer, nor evidence or decree, has arisen as to what limitations, if any, should be put upon the size of an original imported package, and the argument of Attorney General admits these cases and kegs to be original packages.

Indeed, the only evidence in this record as to any sales of intoxicating liquor in packages of "*one-half pint* and upward" is the sales made by the State of South Carolina under the State dispensary law (section 4), by which the State commissioner shall put up his packages, for sale by the dispenser, of not less than *one-half pint, nor more than five gallons*, which packages shall be sold by the dispenser, and shall not be opened on the premises; and the further testimony in the case is that the United States Government has issued licenses for *wholesale* and *retail liquor dealers* to the State liquor dispensers throughout the State of South Carolina who have paid the usual license fees. (Fol. 91, Record.)

It appears, therefore, by this record that the State of South Carolina is doing a *wholesale and retail* liquor business in intoxicating liquors under the revenue laws of the United States, selling from one-half pint to five gallons, and flooding the whole State with intoxicating liquor, in her domestic and interstate commerce, and that the Vandercook Company is conducting only an interstate-commerce business, and is selling only its original, imported, unbroken packages of California wines in cases and kegs. No question of law arises here, except on the facts appearing in this record, and no error is there assigned which would bring before this court this question.

This question of what is an original imported package of wine was before the circuit court of the United States for the district of South Carolina, and was decided in the later case of *Guckenheimer et al. vs. Sellers*, 81 Fed. Rep., p. 997, in which

all the cases are reviewed, and that case, and others like it involving the same question, are now before the circuit court of appeals of the United States for the fourth circuit. It is not, however, made in this case, but concluded by the evidence and the admission of the Attorney General, that a case or keg of wine is an original package, and it is for that reason that we have not discussed it in our brief for appellee.

VIII.

The Attorney General in his brief mistakes our position. Our position is that in equality of lawful products *all* must have inspection and sale under equal regulation. Our wrong is that it is left to the State officer by the South Carolina State system to say whether any California wine shall be sold at all within the State of South Carolina and the State officer regulates interstate commerce in a lawful article. It is made a State privilege to import or not to import California wine for sale in original packages, and it depends upon the *ipse dixit* of the State officer whether or not the wine products of California shall at any time now or hereafter be sold and consumed in the State of South Carolina *while the citizens of the State are manufacturing, selling, and exporting to California and other States their local wines* in interstate trade and while the State is selling by retail and wholesale to all her citizens from one-half pint to five gallons of such liquor as she chooses in domestic and interstate commerce. This is our position: It is the constitutional right of equal privilege and opportunity of California wine as a lawful product to be inspected and sold in interstate trade in South Carolina under equal regulations alongside of and in competition with any wine whatsoever that is actually being there sold to consumers, that is denied altogether, and we are at the mercy of the State officer who chooses wine for sale in South Carolina, not on any fixed principle which protects our right, but wholly at his

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whim, pleasure, discretion, taste, or judgment. He may be influenced by feelings of sympathy for his own State and local industries, and have only South Carolina wine. He may be influenced by sectional feelings, and have only Southern wine. He may as a South Carolinian or a Southerner exclude any other wine, under his unlimited power to furnish all wine for sale. He may even be corrupted to put upon the markets of the State South Carolina wine or North Carolina wine and only such as pays him a corrupt toll. Whereas against this system of the absolute power, according to the whim, caprice, official taste and judgment, local bias, or possible corruption of a State officer, we claim as our certain security against discrimination the right to a fixed system of inspection and sale of our California wine alongside of and in competition with any other wine actually sold in South Carolina in interstate commerce, under the same system of inspection and equal regulations for such sale, wine being by her law a lawful product of the State of South Carolina, and there being manufactured, bartered, sold, exported, and imported and universally used as a beverage. This is our constitutional right under the principle declared by this court in *Scott vs. Donald*, 165 U. S., 100.

What would this court say if the State of Vermont should enact a law against butterine, declaring that no butter should be sold in domestic or interstate commerce in Vermont except by the State officer, and left it to the State officer to import and sell all butter products for local consumption under an inspection law? Would not that give to the State of Vermont the control of interstate trade in butter? Would not that give Vermont, through her official agent, an opportunity to exclude all butter products from other States and sell through her own official agent in Vermont only her own butter product for the benefit of her own dairy interests, and the prevention of competition from other dairies outside the State? Would the rights of producers in other States be remitted by this court to the dis-

cretion of a Vermont State officer that might exclude them altogether and regulate interstate commerce in her interest?

Suppose North Carolina were to take the same position as to tobacco and its adulteration. Would it not give her the opportunity to sell her products in her own interest in the same way as the State of South Carolina has sold and is now selling liquors in her interest, and claims by this act to say what wine under inspection should be sold within South Carolina, which is only a *power* to say that only her own wine should be sold in South Carolina? If this court sanctions this statute, which gives to the State commissioner the right to furnish *all* wine for *lawful sale* in South Carolina, then this court thereby has clothed such State commissioner with the power to say that only South Carolina wine shall be sold in South Carolina, and has left the whole subject simply to his local prejudice or bias, taste, judgment, whim, greed, or pleasure. It is simply and only a question of power. The Supreme Court foresaw how such a right unrestrained would be abused if the State had the power to exercise it for itself in selfish greed in furtherance of its own interests, for in *Brown vs. Maryland*, 12 Wheaton, 448, the court said:

"It will not meet this argument to say that this state of things will never be produced, and that the *good sense of the State is a sufficient security against it.* The Constitution has not confided this *subject to that good sense.* It is placed elsewhere. The question is, *Where does the power reside*, not *how far will it be probably abused?* The power claimed by the State is, in its nature, in conflict to that given to Congress, and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence."

Brown *vs.* Maryland, 12 Wheaton, 447, 448, 449.

Our only protection therefore of our constitutional right of equality of lawful products is the "provision for inspection and sale of *all* imported and domestic liquor

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cision now presented in this case—*i. e.*, the right of equality in interstate trade of lawful products—as here, the right of a producer of California wine to import into the State of South Carolina his wine products in *original unbroken packages* and have the same *inspected* and *sold* under equal regulations in interstate commerce, the Wilson act not applying to exclude such wines because the State herself had made wine a lawful article of commerce by her own laws allowing its manufacture, sale, and use under inspection as a beverage and its import and export as an article of commerce. A reference to the cases quoted by appellants will show this.

In *Ex parte Gonzales* (*Donald vs. Scott*, 76 F. R., 554–559) both of these cases arose under *Donald vs. Scott* for violation of the injunction, which injunction only extended to the protection of the importer for personal use. Both cases came up by way of petition in the main case for violation of that injunction, and no other question did arise or could arise than whether the parties were importers for personal use in order to be within the protection of the injunction. The importer of original packages for sale was not within the terms of the injunction, and his rights had never been determined—had never been before the court or judicially passed upon in any way.

In the case of *Lowenstien vs. Evans*, 69 F. R., 908, the suit was brought under the act of Congress of July 2, 1890, for recovery of *statutory* penalty in restraint of interstate trade and monopoly. The suit was dismissed on the ground that the State is neither "a person nor a corporation" within the meaning of the act of Congress, and on that ground solely. This court distinctly says:

"Now, the question to be decided is not as to the constitutionality of this dispensary act, nor *whether it be within the lawful exercise of the police power*, but whether, in declaring and asserting this *monopoly in herself* and in assuming and controlling its enforcement, the State comes within the provisions of the act of Congress of July 2, 1890." * * *

"No opinion whatever is expressed as to the right of the plaintiff for violation of his common-law rights" (p. 911).

That question, then reserved by the court below, does, however, arise in this case, whether the act is a "lawful exercise of the police power" when it forbids the inspection and sale of the complainants' original imported packages from the vineyards of California, while the State is selling local products in its dispensary, and whatever other products of other States it may or may not choose to import; and our position is that this act is not a lawful exercise of the police power under *Donald vs. Scott*, but that under the South Carolina dispensary law, in the language of *Donald vs. Scott*, p. 93, "intoxicating liquor is an article of interstate commerce," and the duty of the Federal court is to protect it like *any other article* (p. 91), because it is manufactured, bartered, and sold within the State under the State dispensary law, and because ALL imported wine in original packages is entitled to have inspection and sale in the State, when it appears that there is sold in the State, by wholesale and retail, domestic liquor and *some* imported liquor in interstate commerce; and the court below found in *Lowenstein vs. Evans* that the dispensary act did create a monopoly in interstate trade of alcoholic liquors, and the object was to raise revenue and not prevent consumption of liquor, except that not owned by the State.

The circuit court agreed with the State court that it was for revenue.

"It was for the purpose of profit to the State and its governmental agency." (*McCullough vs. Brown*, 41 S. C., 220.)

It was not for morals, but for money; not for police, but for profit.

Under the principle of *Brenan vs. Titusville*, 153 U. S., 289, being an act for revenue, even though the State court might claim it to be the "exercise of the police power," it was distinctly void as an exercise of the police power.

See this case in full.

Also *Ex parte Leboit*, 77 F. R., 587–590.

See particularly page 590.

A license on representative of California Wine Association selling *in Chicago* its wines was held void, as a tax on interstate commerce, *i. e.*, for *revenue!*

In *Ex parte Loeb*, 72 F. R., 657, the question at issue was the legality of arrest of Loeb for violating section 41 of act of March 6, 1896 (*since repealed by act of March* 5, 1897; see Appendix, p. 35, appellee's brief), forbidding—

"Any person to take or solicit orders or to *receive money* from other persons for the purchase or shipment of any alcoholic liquors for or to such other persons in that State, except for liquors to be purchased for dispensary."

The circuit court held such act to be void, and that "soliciting preliminary" to importation was lawful. (*Idem*, p. 660.)

That case decided that particular question alone.

The circuit court did say also that the "State under its police power can control and regulate the liquor traffic either by prohibiting it altogether or by permitting its sale only on *certain prescribed conditions.* Nor can this power be controlled by any law of the United States," and "sale in this State is illegal and void."

This is a true statement of the general proposition of a State—control of *domestic commerce, provided* there is no *discrimination* in the operation of the law; in the same way as it is equally true that the police power of the State can prohibit *use* of liquor altogether or only under certain prescribed conditions. Nor can this power be controlled by any law of the United States, *provided* there is no discrimination against products of other States. The question here, however, is, "Is the State law a 'lawful exercise of the police power of the State' in forbidding *inspection and sale* of imported products that operates to *discriminate* injuriously against the products of other States?"

This question was not touched or decided by the circuit court in *Ex parte Loeb.*

The Supreme Court of the United States (Donald *vs.* Scott, 165 U. S., 100) denounced such a discriminating law as not a lawful exercise of the police power, and we have shown above the manifold discrimination to complainants' wine products, in the denial altogether of provision for its inspection and sale, and denial of its participation in regulations for inspection and sale, when these wines are entitled (Donald *vs.* Scott, 165 U. S., p. 100) to "equal regulation for inspection and *sale*" as a part of *all* imported liquor. (*Idem.*)

And the Supreme Court also held that a State dispensary system—*i. e.*, a law not forbidding manufacture, sale, and use of liquor—is not within scope of Wilson act (*Donald vs. Scott*, 165 U. S., p. 100), so that *right of sale* inhering in imported package, as a constituent part of *interstate* original *commerce*, became again operative.

The court below, in *Ex parte* Loeb, had neither of these questions before it and has never expressed any opinion on them, but distinctly reserved its opinion.

The *Beckroge vs. Harling* case (cited by counsel) was another case arising only on importation for use, and the circuit court declared from the bench that "it would not now decide the question of 'importation for sale' in original imported packages by producers of another State," as that question was not before them, but only one claiming the right of importation for personal use.

Indeed, the circuit court's *first* utterance in 1895 on this question recognized this *discrimination*:

"And further, in so far as this act permits the chief dispenser to purchase in other States alcoholic liquors and to import them into this State for the purpose of *selling* them for use and consumption at retail within the State, and forbids all other persons from so purchasing and importing for their individual use and consumption, it *discriminates* against all other citizens of the State. It *also* makes a DISCRIMINATION against all *persons in the trade in other States* who are not patronized by the State dispenser, *forbidding them to seek* CUSTOM WITHIN THE STATE, and to *enjoy a com-*

mercial intercourse secured to others IN THIS STATE. *These conclusions rest on this discrimination.* If it did not exist, and if all alcoholic liquors were excluded from the State, or if all persons were forbidden to import alcoholic liquors, or if the laws of South Carolina had declared that all alcoholic liquors were of such poisonous and detrimental character, and that their use and consumption as a beverage were against the morals, good health, and safety of the State, other and different questions would arise."

Donald *vs.* Scott, 67 F. R. (1895), 857.

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It thus appears the circuit court has had only one view of this question since 1895, but has meanwhile *decided* only the particular case before it in its decisions.

J. P. K. BRYAN,

Counsel for Appellee, W. A. Vandercook Company.